Filed 4/1/10 P. v. Flood CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JACOB NICHOLAS FLOOD, Defendant and Appellant.	F057970 (Super. Ct. No. CRF28671) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tuolumne County. Eric L. DuTemple, Judge.

Alex Green, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lloyd G. Carter and Lewis A. Martinez, Deputy Attorneys General, for Defendant and Respondent.

---

[*] Before Ardaiz, P.J., Levy, J. and Hill, J.

-ooOoo-

A jury found appellant Flood guilty of driving under the influence of alcohol and causing injury (Veh. Code, § 23153, subd. (a); count 1), driving with a blood alcohol level of .08 or higher and causing injury (Veh. Code, § 23153, subd. (b); count 2), and driving without a valid driver's license (Veh. Code, § 12500, subd. (a); count 3). At appellant's sentencing hearing the court suspended imposition of sentence and admitted appellant to probation for a period of five years. The grant of probation was subject to several conditions, including a condition that appellant serve nine months in the county jail and a condition that appellant "[s]ubmit your person and property including any residence, premises, container or vehicle under your control to search and seizure at any time of the day or night by any law enforcement or probation officer with or without a warrant."

APPELLANT'S CONTENTION

On this appeal Flood contends that he was denied effective assistance of counsel because his trial counsel did not object to the above-quoted condition (the "search condition") of admission to probation. As we shall explain, appellant has not shown that he was denied effective assistance of counsel. We will affirm the judgment.

FACTS

On August 16, 2008, at about 1:00 a.m. appellant, then 19 years old, failed to negotiate a curve on Leland Creek Road in Tuolumne County and skidded into a tree. He suffered a broken leg. His passenger, Gerald Camp, suffered a dislocated shoulder. Appellant testified at trial that he had consumed six or seven beers. He was 5'2" and weighed 120 pounds. Two post-accident tests measured appellant's blood alcohol levels at .22 and then about two hours later at .18. Appellant's unsuccessful defense at trial was that Camp caused the accident by grabbing the steering wheel of the car.

At appellant's sentencing hearing the court adopted the recommendation of the probation department that appellant be admitted to probation subject to various terms and

conditions, which included a jail term and the above-quoted search condition. Appellant agreed in writing that he would comply with the terms and conditions of his probation, and raised no objection to any of those conditions.

EFFECTIVE ASSISTANCE OF COUNSEL

The principles of law pertaining to a defendant's claim of denial of effective assistance of counsel are well established.

> "'Every person accused of a criminal offense is entitled to constitutionally adequate legal assistance.' (*People v. Pope* (1979) 23 Cal.3d 412, 424 [152 Cal.Rptr.732, 590 P.2d 859, 2 A.L.R.4th 1] (*Pope*); see also *People v. Ledesma* (1987) 43 Cal.3d 171, 215 [233 Cal.Rptr. 404, 279 P.2d 8389] (*Ledesma*).) To establish a claim of inadequate assistance, a defendant must show counsel's representation was 'deficient' in that it 'fell below an objective standard of reasonableness.…[¶] … under prevailing professional norms.' (*Strickland* [*v. Washington* (1984)] 466 U.S. [668,] 688 [104 S.Ct. at pp. 2064-2065]; *In re Jones* (1996) 13 Cal.4th 552, 561 [54 Cal.Rptr.2d 52, 917 P.2d 1175].) In addition, a defendant is required to show he or she was prejudiced by counsel's deficient representation. (*Strickland*, *supra*, 466 U.S. at p. 688 [104 S.Ct. at pp. 2064-2065]; *Ledesma*, *supra*, 43 Cal.3d at p. 217.) In determining prejudice, we inquire whether there is a reasonable probability that, but for counsel's deficiencies, the result would have been more favorable to the defendant. (*Strickland*, *supra*, 466 U.S. at p. 687 [104 S.Ct. at p. 2064]; *In re Sixto* (1989) 48 Cal.3d 1247, 1257 [259 Cal.Rptr. 491, 744 P.2d 164].)
>
> "In evaluating a defendant's claim of deficient performance by counsel, there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' (*Strickland*, *supra*, 466 U.S. at p. 689 [104 S.Ct. at p. 2065]; *In re Jones*, *supra*, 13 Cal.4th at p. 561), and we accord great deference to counsel's tactical decisions. (*In re Fields* (1990) 51 Cal.3d 1063, 1069-1070 [275 Cal.Rptr. 384, 800 P.2d 862] (*Fields*).) Were it otherwise, appellate courts would be required to engage in the '"perilous process"' of second-guessing counsel's trial strategy. (*Pope*, *supra*, 23 Cal.3d at p. 426.) Accordingly, a reviewing court will reverse a conviction on the ground of inadequate counsel 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' (*People v. Fosselman* (1983) 33 Cal.3d 572, 581 [189 Cal.Rptr. 855, 659 P.2d 144] (*Fosselman*); see also *People v. Mendoza Tello* (1997) 15 Cal.4th 264 [62 Cal.Rptr.2d 437, 933 P.2d 1134]; *People v. Avena* (1966) 13 Cal.4th 394, 418 [53 Cal.Rptr.2d

> 301, 916 P.2d 1000] (*Avena*).)" (*People v. Frye* (1998) 18 Cal.4th 894, 979-980 (disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421); in accord, see also *People v. Anderson* (2001) 25 Cal.4th 543, 569, and *People v. Stewart* (2004) 33 Cal.4th 425, 459.)

In *People v. Welch* (1993) 5 Cal.4th 228, the court held that "failure to timely challenge a probation condition ... in the trial court waives the claim on appeal." (*Id*. at p. 237.) Appellant did not object to the search condition in the trial court, so he has waived any appellate challenge to the search condition. Instead, he contends that he was denied effective assistance of counsel because his trial counsel failed to object to the search condition at the sentencing hearing. This claim fails. The California Supreme Court has "repeatedly stressed 'that "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] ... unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citations.]" (*People v. Mendoza Tello*, *supra*, 15 Cal.4th at p. 266; in accord, see also *People v. Wilson* (1992) 3 Cal.4th 926, 936, and *People v. Lopez* (2008) 42 Cal.4th 960, 966.) "Unless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' [Citation.]" (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 733; in accord, see also *People v. Carter* (2003) 30 Cal.4th 1166, 1211.) We can readily discern at least two possible tactical reasons why trial counsel reasonably might have chosen not to object to the search condition.

First, even if we were to agree with appellant's contention that the search condition is unreasonable and unlawful, we cannot simply assume that the trial court would have been willing to admit appellant to probation without the search condition. The trial court adopted the disposition recommended by the probation officer's report -- admission to probation under certain specified terms and conditions, including the search condition. If appellant's trial counsel had objected to the search condition and had

persuaded the trial court that the condition was unlawful and could not be imposed as a condition of probation, appellant might instead have been sentenced to a two year prison term. (See Veh. Code, § 23554 & Pen. Code, § 18.) Nothing in the record on this appeal even remotely suggests that appellant was so opposed to the search condition that he would have preferred a prison term instead. "If a defendant believes the conditions of probation are more onerous than the potential sentence, he or she may refuse probation and choose to serve the sentence." (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) Appellant did not refuse the offer of probation. This possible tactical reason alone requires us to reject appellant's contention that the record on appeal demonstrates a denial of his right to the effective assistance of counsel.

Second, appellant's trial counsel may have chosen not to object to the search condition because of a reasonable, tactical decision to refrain from making what counsel may reasonably have believed would have been a meritless objection. "[D]efense counsel is not required to make futile motions or to indulge in idle acts to appear competent." (*People v. Torrez* (1995) 31 Cal.App.4th 1084, 1091.) "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality ....' [Citation.]" (*People v. Lent* (1975) 15 Cal.3d 481, 486, fn. omitted; in accord, see also *People v. Dominguez* (1967) 256 Cal.App.2d 623, 627, *People v. Olguin*, *supra*, 45 Cal.4th at p. 379, and *In re E. J.* (2010) 47 Cal.4th 1258, 1295-1296.) "This test is conjunctive -- all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*People v. Olguin*, *supra*, 45 Cal.4th at p. 379; in accord, see also *People v. Lent*, *supra*, 15 Cal.3d 481, 486, fn. 1.) In *People v. Ramos* (2004) 34 Cal.4th 494, the defendant was, like appellant in the case presently before us, "convicted of violating Vehicle Code section 23153, subdivision (a) (felony driving under the influence (DUI) with injury)." (*People v. Ramos*, *supra*, 34 Cal.4th at p. 505.) The defendant in

Ramos was granted probation, subject to a search condition virtually and substantively identical to appellant's, requiring him to "'submit his person, property and automobile, and any object under the defendant's control, to search and seizure by any probation officer or other peace officer at any time of the day or night with or without a warrant.'" (*Ibid*.) The defendant in *Ramos* contended that the search condition was unlawful. The California Supreme Court addressed the argument and expressly rejected it:

> "[W]e find no error. The trial court properly held that the probation search condition was reasonably related to the DUI conviction, which allowed officers to search and seize defendant's person, property, and automobile in order to protect the public. As we have held, 'The level of intrusion is de minimis and the expectation of privacy greatly reduced when the subject of the search is on notice his activities are being routinely and closely monitored. Moreover, the purpose of the search condition is to deter the commission of crimes and to protect the public, and the effectiveness of the deterrent is enhanced by the potential for random searches.' [Citation.]" (*People v. Ramos*, *supra*, 34 Cal.4th at pp. 505-506.)

Appellant argues that his search condition has no relationship to his Vehicle Code section 23153, subdivision (a) violation and is not reasonably related to future criminality, and therefore satisfies neither the first prong nor the third prong of the *Lent* test. Appellant's opening brief makes no mention, however, of *People v. Ramos*, *supra*, 34 Cal.4th 494. The decisions of the California Supreme Court "are binding upon and must be followed by all the state courts of California." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; in accord, see also *People v. Lessie* (2010) 47 Cal.4th 1152, 1167.) This court is therefore bound to conclude that appellant's search condition is valid, and the trial court would have been bound to reach that same conclusion if appellant's trial counsel had objected to the search condition at appellant's sentencing hearing.

Appellant relies on *People v. Keller* (1978) 76 Cal.App.3d 827 and *In re Martinez* (1978) 86 Cal.App.3d 577. All we need say about these cases is that they are Court of

Appeal decisions which preceded the California Supreme Court's decision in *People v. Ramos, supra*, 34 Cal.4th 494) and that we are bound by *Ramos*. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d 450.) The *Keller* case "placed a 'gloss' on the three-pronged *Lent* test by adding an overall requirement of reasonableness in relation to the seriousness of the offense for which defendant was convicted." (*In re Martinez, supra*, 86 Cal.App.3d at p. 583.) The *Martinez* court then stated "[w]e are of the opinion that the *Keller* court's approach was sound and we approve." (*Ibid*.) Twenty-one years after *Keller* was decided, however, the court which had issued the *Keller* decision (Fourth District, Division One) expressly repudiated it in *People v. Balestra* (1999) 76 Cal.App.4th 57 as "inconsistent with the Fourth Amendment jurisprudence since the date of that decision" and "inconsistent with subsequent case authority from both the United States and California Supreme Courts." (*People v. Balestra, supra*, 76 Cal.App.4th at pp. 67, 68.) Appellant argues that *Balestra* should not be followed, but the argument is unavailing because we are bound by *Ramos, supra*.

DISPOSITION

The judgment is affirmed.